

Service Date: August 3, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of	)	UTILITY DIVISION
THE MONTANA POWER COMPANY's	)	
1) Approval of the Default Supply Portfolio, and	)	DOCKET NO. D2001.10.144
2) the Projected Electric Cost Tracking for the	)	ORDER NO. 6382e
12-Month Period Beginning July 1, 2002.	)	

**ORDER ON REMAND/NOTICE OF COMPLIANCE**

**Background**

On October 29, 2001 the Montana Power Company, now known as and hereafter referred to as NorthWestern Energy (NWE), filed for approval of its proposed default electricity supply portfolio.<sup>1</sup> On October 19, 2001 NWE filed, pursuant to ARM 38.2.5001-5030, a Motion for Protective Order to cover certain information that would be submitted with the filing. On October 29, 2001 the Commission voted to grant the Motion and, on October 30, 2001 issued Protective Order No. 6382.

On November 27, 2001 certain members of the media and certain media organizations<sup>2</sup> (Media) challenged Protective Order No. 6382 by filing in the Montana First Judicial District Court (district court) a Petition to Obtain Records and an Order to Show Cause. The Commission filed a Motion to Dismiss; NWE filed a Motion to Dismiss and a Motion to Intervene. On March 1, 2002 the district court denied the motions to dismiss, and granted the NWE Motion to Intervene. On April 19, 2002 the district court issued an order finding that certain information claimed confidential trade secret and covered by Protective Order No. 6382 is trade secret and can lawfully be withheld from the public, while other information protected by Order No. 6382 is not trade secret and must be disclosed. Both the March 1 and April 19, 2002 decisions of the district court were appealed to the Montana Supreme Court (Court); however, NWE did not appeal, so that the district court's decision on the information that must be disclosed was final. On December 18, 2003 the Court issued its decision in Great Falls Tribune v. Public Service Commission and Montana Power Company, 2003

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<sup>1</sup> For background to this filing see Order No. 6382d in this docket, pp. 3-7, June 21, 2002.

<sup>2</sup> The Great Falls Tribune; The Billings Gazette; The Montana Standard; The Helena Independent Record; The Missoulian; Big Sky Publishing, Inc., d/b/a The Bozeman Daily Chronicle; The Montana Newspaper Association; The Miles City Star;

MT 359, 319 Mont. 38, 82 P.3d 876.

### **Notice of Compliance**

The Commission has carefully reviewed Great Falls Tribune and has taken actions required to comply with the Court's decision. First, at paragraph 44 the Court writes:

...[W]e note that the PSC must review its administrative rules for purposes of challenging confidentiality, since they appear to be primarily concerned with competitor utilities seeking information. Some of the rules may not apply to the media, such as Rules 38.2.5027 and 5028, ARM, requiring interested parties to sign a nondisclosure statement.

The Commission has considered these sentences and concludes that they reflect a misunderstanding on the part of the Court. The Commission's rules on challenging confidentiality are not "primarily concerned with competitor utilities seeking information." Rather, Commission rules permit a challenge by anyone who contends that the information may not be lawfully protected. Also, ARM 38.2.5027-28 do apply to the media.

Second, at paragraphs 56 and 57 the Court writes as follows:

Accordingly this Court hereby rules that a non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by filing a supporting affidavit making a prima facie showing that the materials constitute property rights which are protected under constitutional due process requirements. The claimant's showing must be more than conclusory. It must be specific enough for the PSC, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality. To the extent that the PSC's current procedural rules require less, this Court directs their amendment to comport with its holding herein.

Furthermore, this Court hereby rules that the governmental agency has the affirmative duty to review at the time of filing of the alleged confidential records of a non-human entity, and the hereinafter required supporting affidavits, and make an independent determination whether the records are in fact property rights which warrant due process protection under the applicable state or federal law.

In practice the Commission attempted to comply with this direction immediately after the decision was issued. Furthermore, the Commission has proposed revisions to its protective order rules to

comply with Great Falls Tribune, see MAR, Issue No. 14, 1595-1611 (July 22, 2004), and anticipates adopting revisions within 90 days of this Order.

### **Order on Remand**

On appeal the Commission challenged the district court's refusal to dismiss the Media petition for failure to exhaust administrative remedies. The Court held that the Media should have exhausted administrative remedies and remanded the question of the confidentiality of the challenged documents back to the Commission. The Court wrote:

In light of our decision, we reverse the District Court's conclusions regarding the confidentiality of the documents and remand to the District Court for proceedings consistent with this Opinion. That is, assuming the media wishes to still pursue this matter and the issues remain justiciable, the District Court shall, in turn, remand this matter to the PSC for determination of whether the documents in question must be disclosed or may be kept confidential as a trade secret or other property right entitled to protection. Proceedings on remand shall take into consideration the procedural concerns set forth in this Opinion, specifically those concerns set forth under our discussion in Issues III and IV.

Great Falls Tribune, ¶ 65, on July 2, 2004 the district court issued a Memorandum and Order on Motion for Reconsideration and Motion to Implement Supreme Court Mandate, Cause No. CDV-2001-708, in which it referred to this language and ordered: "This Matter Is Remanded to the Public Service Commission for further proceedings consistent with the Supreme Court's decision." In this Order the Commission implements the remand from the Court and the district court.

The theoretical effect of the remand in Great Falls Tribune would be to return the Commission, the Media and NWE to November 27, 2001, the day the Media filed its Petition in district court, and to proceed through an administrative challenge to Protective Order No. 6382 according to the Commission protective order rules that existed at that time. Such an action, however, would neither be legally correct nor realistic.

The process for requesting a protective order has changed significantly since October 2001. (1) Change has been initiated by the Commission on its own initiative, in response to the Media litigation, and in response to specific direction in Great Falls Tribune. The Commission cannot proceed on remand as if those changes have not been made. (2) A significant number of documents that initially were filed under protective order were either

made public by NWE voluntarily as a result of the Media challenge, or were found to be public documents by the district court and released by NWE without appeal. (3) The confidential nature of documents may be and often is influenced by the passage of time. A valid case for protection of documents in the fall of 2001 may not be valid today. (4) The media challenge had the positive effect of forcing the Commission, NWE and to some degree the courts, to consider the elements of trade secret more carefully than had been done previously. This is reflected to some degree in the last sentence at paragraph 65 of Great Falls Tribune, quoted above, wherein the Court instructs the Commission on remand to consider the Court's discussion at paragraphs 58-63 of the decision. After Great Falls Tribune the Commission must more carefully consider trade secret elements at the pleading stage.<sup>3</sup>

Therefore, the Commission finds that on remand NWE must file a new request for protective order in this docket, consistent with post Great Falls Tribune pleading requirements as described in the Commission's proposed revised protective order rules. MAR, Issue No. 14, 1595-1611 (July 22, 2004). This will ensure that the NWE pleading and the Commission's consideration is consistent with the new state of the law; and it will also have the practical benefit of identifying, after almost three years of turbulence, exactly what documents NWE still claims are confidential information.

#### Conclusions of Law

1. All conclusions of law reached above are incorporated herein.
2. The Montana Public Service Commission (Commission) regulates the rates and services of public utilities. Title 69, Chapter 3 and 8, MCA.
3. NorthWestern Energy (NWE) is a public utility subject to the jurisdiction of the Commission.
4. NWE, when required to provide information to the Commission, may request a protective order.

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<sup>3</sup> This should not be interpreted as an admission that the Commission was heedless or nonchalant about the application of trade secret standards prior to Great Falls Tribune. Even under the Mountain States regime (Mountain States Telephone v. PSC, 194 Mont. 277, 634 P.2d 181 (1981)) the Commission was cognizant of trade secret elements in pleadings, and attempted to analyze and apply those elements carefully in response to a challenge to confidentiality. See Order on Providers' Claims of Confidentiality, Order No. 6382b, this docket. However, in a relative sense, Great Falls Tribune requires the Commission to concentrate on trade secret elements at the pleading stage to a greater degree than before.

5. The Commission may issue protective orders pursuant to § 69-3-105, MCA.
6. This order lawfully implements the remand instructions of the Supreme Court and the remand order of the district court.

Order

NorthWestern Energy must refile a request for protective order in this docket according to the direction above. Failure to refile by August 24, 2004, will result in Commission action vacating Protective Order No. 6382 in this docket, and the release of any information currently protected by that Order.

DONE AND DATED this 20th day of July 2004, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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BOB ROWE, Chairman

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TOM SCHNEIDER, Vice Chairman

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MATT BRAINARD, Commissioner

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GREG JERGESON, Commissioner

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JAY STOVALL, Commissioner

ATTEST:

Connie Jones  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.  
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.